82-606

No.

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ALEXANDER L. STEVAS,
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IN THE

Supreme Court of the United States

October Term, 1982

CHAKIB SAAD,

Petitioner,

against

UNITED STATES OF AMERICA,

Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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WILLIAM SONENSHINE
Member of the Bar of the Supreme Court of the United States
Attorney for Petitioner
One World Trade Center
Suite 3701
New York, NY 10048
(212) 524-9000

QUESTIONS PRESENTED.

1. Was the circumstantial evidence sufficient to sustain the conviction?

2. (a) Was the experiment conducted by the jury a fair one under the evidence?

   (b) Was it error for the jury, during its deliberations, to conduct the experiment in open Court in the presence of the Court and Counsel and the defendants?

3. Was it error for the prosecutor to refer in summation to the "uncontradicted" testimony in the case where petitioner did not testify?

4. Was it prosecutional misconduct for the prosecutor, in summation, to infer that the agents had learned of petitioner's hotel room

number from a post-arrest statement by co-defendant Gemeyel where the statement itself was not in evidence at trial?

5. Was the evidence at the suppression hearing sufficient to establish probable cause and exigent circumstances?

PARTIES

The parties in the trial Court below were the United States Government and petitioner and his two co-defendants, Joseph Gemayel and Yacoub Fayad. Gemayel was convicted and appealed separately. His conviction was affirmed. Fayad was acquitted.

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NO.

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1982

CHAKIB SAAD,

Petitioner,

- against -

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUT

OPINION BELOW

A copy of the Order and Opinion of the United States Court of Appeals for the Second Circuit, decided August 10, 1982, (Docket # 82-1107) affirming petitioner's conviction below, is annexed hereto as Appendix A.

The Order and Decision of District Judge Jacob Mishler is annexed hereto as Appendix B.

JURISDICTION

(a) The judgment of conviction was rendered and entered in the United States District Court for the Eastern District of New York March 19, 1982 (Mishler, J.) after trial by jury convicting petitioner of the crimes of conspiracy to import heroin (Count One) in violation of 21 U.S.C. § 846 and § 963 and possession of heroin with intent to distribute (Count 2) in violation of 21 U.S.C. § 841). Petitioner received sentences of probation.

(b) The judgment of affirmance of the United States Court of Appeals affirming the petitioner's conviction is dated August 10, 1982.

(c) Jurisdiction to review the judgment of conviction by certiorari is conferred by 28 U.S.C. § 1254-(1).

CONSTITUTIONAL and STATUTORY PROVISIONS INVOLVED

The constitutional provisions involved are the Fourth Amendment to the United States Constitution, and the Fifth Amendment thereto.

The Statutes involved are 21 U.S.C. §§ 841, 846 and 963.

STATEMENT OF THE CASE

Two government undercover agents (Mangor and Hernandez) from the DEA had extensive negotiations with co-defendants Gemayel and Fayad and others which ultimately led to the arrest of Gemayel in Kennedy Airport on December 13, 1980 when Gemayel delivered a half Kilo of heroin to agent Mangor. Up to this point in time petitioner was not mentioned in any of the numerous conversations and meetings among the agents and the alleged co-conspiritors. Peitioner was arrested several hours after Gemayel had delivered the half-kilo as aforesaid.

After interviewing Gemayel, the agents went to the Statler Hotel in New York. Mangor, accompanied by Hernandez and others went to petitioner's room on the 17th floor of the hotel. Mangor knocked on the door and announced he was a DEA agent. He heard a window being opened as the

voice inside was saying "who is it?" The hotel security officer inserted a key into the lock. The door opened partly but would not open entirely because a security chain on the door. Hernandez thus kicked the door open and the agents entered the room.

Petitioner, alone in the room, was wearing pants, open shirt and no shoes. The room was warm but a cold gust of wind was coming in through an open window. Mangor looked out the window and observed something shite on a roof 13-14 floors below. Hernandez went down to the roof. The white object seen by Mangor turned out to be paper, but Hernandez did find four packages of heroin on another part of the same roof, one of which was open with some of the contents spilled on the roof.

REASONS FOR GRANTING THE WRIT

POINT ONE

THE EVIDENCE WAS INSUFFICIENT IN LAW TO SUSTAIN THE CONVICTION.

We commence our analysis of the trial evidence by pointing out that it was the government's theory of the case that the constructive possession charged in the indictment against petitioner was not the narcotics later found on the Statler roof but, rather aiding and abetting the sale of narcotics by Gemayel to Mangor earlier that evening at JFK Airport (1151;43a). In support of that contention it was the corollary theory of the government that the narcotics found on the Statler roof (1) was in the constructive possession of petitioner and (2) was the remainder of the larger quantity from which the narcotics were sold by Gemayel to agent Mangor after petitioner allegedly brought it into Kennedy Airport.

We consider firstly those defects in the government's proof which, we urge, render the evidence insufficient in law to establish guilt beyond a reasonable doubt.

1. The narcotics was concededly not found either on petitioner's person or in his hotel room.
2. The narcotics were found on a roof some 12-13 floors below petitioner's room. There were, however, a large number of other rooms which overlooked that same roof. Many of those rooms were also lit up at the time.
3. The narcotics were first discovered on the roof approximately 45 minutes after the agents entered petitioner's room. Any one of the occupants of the other rooms could as well have caused the narcotics to be on the roof.
4. No fingerprints of petitioner were found on any of the four packages of heroin on the roof.
5. The names of three alleged owners of the heroin are described by Faraj in the tape recordings as Mr. Naif from Amsterdam and Mr. Naif from Lebanon and

Faraj himself. No reference is made to petitioner either as owner of the heroin or in any other capacity.

The governemtn was therefore left to seek to establish petitioner's possession and membership on the conspiracy by way of circumstantial evidence. The linch pin of their argument appears to rest on the assumption that the claimed opening of petitioner's window was equated with the flinging away of the narcotics - a theory wholly devoid of supporting evidence. Conversely, the government also argues that the claimed finding of narcotics is proven by the opening of the window which, in turn allegedly establishes that the narcotics were already there. Here, too, the record demonstrates a dearth of supporting evidence. At best, the record establishes no more than a tenuous basis for an ephemeral suspicion falling far short of guilt beyond a reasonable doubt.

Thus, if we are correct in our contention, there is insufficient evidence to establish beyond a reasonable doubt that petitioner possessed the narcotics found at the Statler Hotel, no case is made

out against him either as to the conspiracy or the possessory count since that is the critical evidence in the case.

Conversely even if it be held that petitioner possessed the heroin found at the Statler Hotel, there is, nonetheless, no evidence to link that possession to the heroin sold to Mangor at Kennedy Airport or to the conspiracy.

POINT TWO

IT WAS PREJUDICIAL ERROR FOR THE COURT TO DIRECT THE DELIBERATING JURY TO PERFORM ITS PROPOSED EXPERIMENT IN OPEN COURT

During its deliberations, the jury sent a note to the Court requesting permission to see whether the heroin found on the roof could get into the attache case which was found in petitioner's hotel room. Objection's by defense were made on the grounds that in making the purity tests the Government separated the pure heroin from the mixed; removed the original wrappings and therefore the packages of heroin were no longer in the same condition. Moreover there was no proof that the heroin ever was

in the attache case and in any event a quantity was spilled on the hotel roof and the amount thus lost was not known. Objections were overruled.

This was error because the experiment was not within the context of the evidence and did not fairly duplicate the original conditions which gave rise to the inquiry. See, U.S. v. Beach, 296 F. 2d 153 (8 Cir. 1961; U.S. v. Peltier, 585 F2d 314, Cert. den. 99 S. Ct. 1422, 440 U.S. 945; Friedman v. U.S. 347 F. 2d 697 (8 Cir. 1964), Cert. den. 382 U.S. 946, 86 S. Ct. 407.

Additionally the experiment was conducted during the jury's deliberations. Yet the Court permitted the experiment to take place in open Court in the presence of the Court, Counsel and the defendants. Thus the deliberations were partly conducted in the presence of unauthorized persons, analagous to the presence of an unauthorized person in jury room itself. This was plain error. See, U.S. v. Virginia Erection Corp., 335 F 2d 868 (4 Cir.1964);

In the instant case the presence of the trial judge and the attorneys and defendants may

well have inhibted some or, indeed, all of the jurors in the manner and thoroughness with which the experiment was conducted.

In the U.S. v. Beasley, 464 F. 2d 468, 470 (10 Cir. 1972) The Court pointed out:

> "Once the prescribed number of jurors becomes 'the jury', then, and immediately, any other persons are strangers to its proceedings. Their presence destroys the sanctity of the jury and a mistrial is necessary".

See, also U.S. v. Chatman, 584 F 2d 1358 (4 Cir. 1978).

POINT THREE

IT WAS PREJUDICIAL ERROR FOR THE PROSECUTOR TO REFER IN SUMMATION TO "UNCONTRADICTED TESTIMONY"

Petitioner did not testify in his own behalf. Nonetheless the prosecutor, during her rebuttal summation referred to the "virtually uncontradicted" testimony of the undercover agent.

Motions for a mistrial were denied. In its charge in the usual fashion to the jury the Court

stated that no unfavorable inference should be drawn by reason of the petitioner's failure to testify. We urge however, that the charge failed to cure the error.

In U.S. v. Bubar, 567 F. 2d 192, 199, (2 Cir, 1977), Cert. den. 434 U.S. 872 98 S. Ct. 217 (1977) it was held: with respect to comments on a defendant's failure to testify:

> "A constitutional violation occurs only if either the defendant alone has the information to contradict the government evidence referred to or the jury 'naturally and necessarily' would interpret the summation as a comment on the failure of the accused to testify. United States ex rel. Leak v. Follette, 418 F. 2d 1266 (2 Cir. 1969), cert. denied. 397 U.S. 1050 (1970)".

In the case at bar the Government's case against petitioner depended entirely on the credibility of the Government Agents as to the occurrence in appellant's hotel room - i.e. Whether petitioner threw the narcotics out of his window. Absent the evidence of this occurrence there clearly was no case against petitioner since he was never referred to in any of the other events which led to

the arrest of Gemayel at Kennedy Airport a few hours earlier.

Applying these principles to the case at bar it becomes readily apparent that appellant, being alone in the room with the Government witnesses, could call only himself to the stand to contradict the Government's witnesses. Thus the prosecutor's comments were clearly designed to point to appellant's failure to take the stand - a direct violation of his Fifth Amendment rights.

POINT FOUR

IT WAS PROSECUTORIAL MISCONDUCT FOR THE PROSECUTOR TO INFER IN REBUTTAL SUMMATION THAT THE AGENTS HAD LEARNED THE ROOM NUMBER OF APPELLANT SAAD'S HOTEL ROOM FROM A POST-ARREST STATEMENT OF CO-DEFENDANT GEMAYEL

As preciously indicated in POINT ONE, Co-defendant Gemayel was arrested at Kennedy Airport a few minutes after there delivering a quantity of heroin to Agent Mangor. Gemayel was immediately interviewed by the agents at the Airport whereupon he told them that the owner of the heroin was in Room 1713-A of the Statler hotel and was named Saad.

This, of course, was a post-arrest statement by Gemayel. Since, the defendant Saad was on trial with Gemayel, the court below properly ruled that this was a statement which could not be received in evidence under Bruton v. United States, 391 U.S. 123, 20L. Ed. 2d 476, 88 S Ct. 1620.

At the trial, no evidence of Gemayel's aforesaid post-arrest statement was introduced into evidence. As also previously indicated (POINT ONE), Supra) there was no evidence at the trial of any participation by Saad in the crimes charged prior to the forced entry into his hotel room, Room 1713-A, nor was there any evidence as to how or why the agents decided to break into and enter Saad's room in particular. There was evidence, however that as a result of the post-arrest interview of Gemayel the agents went to Saad's room.

In an effort to persuade the jury that the source of this information may have come from Gemayel's post-arrest interview statements, the prosecutor inquired of Mangor whether, as a result of the interview, the agents went to Saad's hotel room. Objection

was made and overruled (394). This was error.

Notwithstanding this, the prosecutor, in her rebuttal summation, made the following statement in an attempt to link Gemayel's post-arrest "interview" disclosures (in which he named Saad and gave Saad's room number to the DEA agents) with the basis upon which the agents knew where to go and whom to seek out.

> "Mr. Gemayel has told the agent that two kilograms of heroin are at the hotel with the owner". "Now they go to the door....."

The first quoted sentence was a reference to a pre-arrest statement by Gemayel made during the course of the alleged conspiracy shortly before he was arrested. This statement however did not disclose who the "owner" was nor in which room the "owner" was staying. This detailed information came exclusively from Gemayel's post-arrest interview and the prosecutor was prohibited from disclosing this information to the jury.

The prosecutor thus sought to do indirectly what she was clearly prohibited from doing directly. This was accomplished by improperly inviting the jury

to conclude from the quoted argument that Gemayel, the claimed accomplice, had implicated Saad and in effect, told the agents where to look - facts of which the agents were theretofore totally unaware. As the prosecutor noted later on in the rebuttal summation, "The testimony was that these agents were directly -- went directly to room 1713-A and directly to room 898 (Gemayel's room)."

Motion for mistrial was denied.

Although the Court gave curative instructions to the jury to the effect that there was no evidence in the record that indicated Saad owned the heroin or was identified as the occupant of room 1713A, these instructions did not cure the error.

To the contrary, by pointing out that there was nothing in the record to show that Saad owned the heroin or was the occupant of room 1713-A, the court exacerbated the situation. Once again the question arose: How did the agents decide to go "directly to room 1713-A and 898"? The only reasonable conclusion for the jury to have reached

was that Gemayel informed them during the post-arrest interview at the Airport immediately after which the agents "went directly to room 1713-A". In effect, the Bruton proscription was thereby nullified.

POINT FIVE

THE TRIAL COURT ERRED IN DENYING PETITIONERS MOTION TO SUPPRESS EVIDENCE

The basic facts are set forth in POINT ONE, Supra, and in the opinion of Hon. JACOB MISHLER, District Judge, in his opinion denying petitioner's motion to suppress evidence, A copy thereof is appended to the petition as Appendix B. Accordingly the facts are not reiterated here.

The Court denied the motion to suppress the petitioner's statements and the evidence seized in his room and on the roof below. Subsequently the Court wrote a memorandum of Decision and Order. The latter is set forth in full as Appendix B. In essence, the Court

found petitioner's statement to be voluntary and found the forced entry into his room to be justified by exigent circumstances.

We urge, however, that there was no basis in law for the warrantless entry by force into petitioner's locked hotel room, wherein he had a reasonable Fourth Amendment right to expect no intrusion into his privacy (Katz v. U.S., 389 U.S. 347, 88 S. Ct. 507 (1967); U.S. v. Martinez Fuerte, 428 U.S. 543, 96 S. Ct. 3074; U.S. v. Reed 572 F. 2d 412, 2 Cir. 1978).

The information received from Gemayel was uncorroborated. Gemayel had no demonstrated record of reliability. To the contrary, his own situation was ripe for seeking to falsely implicate petitioner in order to extricate himself from his own hopeless situation.

The Government relies primarily on

exigent circumstances to justify its otherwise clearly unconstitution entry into petitioner's hotel room. These circumstances are, in reality, more fortuitous than anything else. There is no doubt from the facts that the agents had every intention of forcibly entering petitioner's hotel room irrespective of what the circumstances were or would be on their arrival. Else why arrange for the master key to be brought to the door in readiness for use? Certainly if petitioner did not respond to their knock, the agents would not go away but would nonetheless open the door without permission by use of the key.

We therefore urge that the Courts below erred in denying petitioner's motion to supress.

CONCLUSION

THE WRIT OF CERTIORARI
SHOULD BE GRANTED

Dated: October 1, 1982

Respectfully submitted,

WILLIAM SONENSHINE
Attorney for Petitioner